

John McCarthy

Old Granite Development vs. The City of Toledo, et al

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IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OHIO  
WESTERN DIVISION

OLD GRANITE DEVELOPMENT :  
LTD, :  
Plaintiff, :  
vs. :Case No. 3:06CV2950  
Judge Zouhary  
THE CITY OF TOLEDO, et al, :  
Defendants. :

- - -

Deposition of JOHN McCARTHY, a Witness  
herein, called by the Defendants as upon  
Cross Examination under the Ohio Rules of Civil  
Procedure taken before Maureen St. John,  
Registered Professional Reporter and Notary  
Public in and for the State of Ohio, pursuant to  
stipulations of counsel, at the office of Bahret  
& Associates, 7050 Spring Meadows West Dr.,  
Holland, Ohio, on Wednesday, January 23, 2008, at  
11:10 a.m.

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ST. JOHN REPORTING  
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1 with in Point Place. He claims that that's, the  
2 railroad property itself, not the farm that Jack  
3 bought because that was farm. You can develop  
4 that, but that the railroad letting those trees  
5 grow up, that that is truly a wetland, that whole  
6 embankment. Once they let those trees grow up  
7 the years that they did, that his opinion was  
8 that that would be clearly a valuable wetland.

9 Q. Did he see it before the trees were cut  
10 down?

11 A. No, he didn't.

12 Q. Did he see it at all?

13 A. He was out there and he saw aerial photos.

14 Q. Did you have an opinion one way or another,  
15 or are you just telling us what this other guy's  
16 opinion is?

17 A. I'm really relying on him. My work in the  
18 Corps was not a wetlands guy.

19 MR. BAHRET: There goes your request  
20 for fees, Marv. He doesn't have an opinion.

21 Q. Did you pull any kind of permit to --

22 MR. ROBON: He does have an  
23 opinion, but it's based upon somebody else's  
24 consultation.

25 MR. BAHRET: He just told me he

1 doesn't have an opinion, Marv.

2 Q. Did you pull any kind of permits to do any  
3 work behind Old Granite after the trees were cut  
4 down?

5 A. You mean like wetland permits?

6 Q. Yeah. Did you -- somebody was putting dirt  
7 in there; is that correct?

8 A. In the wetlands area or on the embankment or  
9 what are you talking about?

10 Q. Did anybody move any dirt after the City had  
11 the trees and vegetation cut down on the  
12 railroad?

13 A. Yeah, the City did or their contractors did.

14 Q. They moved dirt?

15 A. Yeah.

16 Q. My understanding is that Old Granite moved  
17 dirt. Do you have any understanding on that  
18 issue?

19 A. No, not on the railroad property. We moved  
20 it on the Cambridge property. We started a  
21 mound.

22 Q. Did anybody pull a permit to build the  
23 mound?

24 A. It wouldn't be necessary.

25 Q. Why would it not be necessary?

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1 A. It's farmland. It's been farmland forever,  
2 and you don't need a permit for that. The trees  
3 weren't growing up on it. It's only if the trees  
4 have grown up that these things return back to  
5 wetlands is the real issue.

6 Q. Your understanding is the wetlands then were  
7 not on old Cambridge property?

8 A. Right.

9 Q. So if whatever your friend claims was a  
10 wetland, if trees were removed, that wasn't done  
11 on Old Granite property?

12 A. Right.

13 Q. I'm assuming you don't have an understanding  
14 as to the definition of a wetland, the legal  
15 definition?

16 A. No, I'd leave that to --

17 Q. You'd leave that to --

18 A. Gary.

19 Q. Gary?

20 A. That's his bag.

21 Q. Did you ever walk on that railroad  
22 right-of-way before it was cleared?

23 A. Probably not.

24 Q. Do you have any knowledge of any trees back  
25 there, weeping willow trees or anything of that

1 A. Came down from Bates Road. Came up and back  
2 onto Cambridge property that way.

3 Q. Where did they dump the dirt, all on 15 or  
4 16?

5 A. 15 and 16 is where we started.

6 Q. What did you do with the dirt after it was  
7 dumped?

8 A. We started, as the trucks dumped, he would  
9 be pushing it out and grading it up and starting  
10 a mound.

11 Q. He being Gradel Company?

12 A. Yeah, I had a separate guy bring the dirt  
13 in. George Gradel Company, they went and they  
14 provided the equipment.

15 Q. Who was your man from Gradel Company?

16 A. The superintendent?

17 Q. Yes.

18 A. His name was Tom Briggs.

19 Q. Was he the guy doing the grading on the  
20 Cambridge property?

21 A. He was the superintendent. The guys worked  
22 for him, the equipment operators.

23 Q. So he had operators that were there doing  
24 the grading?

25 A. Right.

1 Q. What kind of vehicle or what kind of truck  
2 did they use to do the grading?

3 A. They had a bulldozer and they had a backhoe.

4 Q. In addition to what we see in Exhibit F?

5 A. Yes, this was just to uncover the trees  
6 here.

7 Q. So they brought how many trucks, a dozen  
8 dump trucks full of dirt and put it down, and  
9 then it was graded on to your property; is that  
10 right?

11 A. They used a dozen different trucks, but they  
12 ran it for a day. They probably had ten loads  
13 apiece, probably a hundred, maybe a hundred loads  
14 of dirt we brought in.

15 Q. Did you start to make your mound?

16 A. Yeah, yeah. They went and started shaping  
17 it up. They had the dozer there.

18 Q. First of all, they probably had to do some  
19 filling of low levels on your property, didn't  
20 they, with the first loads of dirt?

21 A. Well, it was already -- you know, this was  
22 already graded. It was already a finished  
23 development. We were raising up the grade of the  
24 backyard.

25 Q. Am I correct in understanding where they

1 dumped the dirt would have been the property edge  
2 of Old Granite right next to where the railroad  
3 property was? They started there and then worked  
4 toward the home?

5 A. Yes.

6 Q. How far did they grade from that point  
7 toward the home? What distance was that?

8 A. Oh, it was probably about 20 feet, 25 feet.

9 Q. How deep, how high did this mound get at any  
10 particular time?

11 A. You can see here; this is all we got. We  
12 got up to about this grade, which is only about  
13 six feet high or five feet you can see here.

14 Q. Is the dirt that we see on the left-hand  
15 portion of this picture, is that part of the  
16 mound?

17 A. This is our dirt over here.

18 Q. So what, if that's your dirt and that's the  
19 mound partially shown in Exhibit F, what is the  
20 hole for that's dug by this backhoe in picture  
21 Exhibit F?

22 A. This hole here?

23 Q. Yes.

24 A. That's where we were verifying where the  
25 trees were so that we could go and survey them

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1 and put a line on these and show which trees were  
2 actually, the base of them were on Cambridge  
3 property. We were uncovering the top.

4 Q. Did you have a record of the date when you  
5 brought in the hundred loads of dirt?

6 A. Yes, we do. I've got records of that.

7 Q. What are those records called, I mean?

8 A. They billed us and everything, so that's the  
9 foreman's report or the daily -- some kind of a  
10 daily report.

11 Q. Do you have records from Gradel Company?

12 A. Same thing.

13 Q. Obviously, that work was done prior to any  
14 of the piping laid for the water main project,  
15 wasn't it?

16 A. Yes.

17 Q. Let me show you a few more pictures.

18 (Defendant's Exhibit G marked  
19 for identification.)

20 Q. Do you have Exhibit G in front of you?

21 A. Yes.

22 Q. I take it that's you in the picture shown  
23 next to the pipe?

24 A. It looks like me.

25 Q. And do you know who that other gentleman is



1 is that right?

2 A. Well, you're getting real close to the, you  
3 know, that's right on the line. Whether Ric-Man  
4 did it or we did it, I couldn't tell you because  
5 it's really close. That's, right where that  
6 little fence is and that the property line was.

7 Q. What I'm getting at is the dirt that you dug  
8 up, for example, in Exhibit F to look for what  
9 was under it, that was dirt that you had trucked  
10 in; isn't that right?

11 A. Most of it.

12 MR. ROBON: You're now 30 minutes  
13 past your 20 minutes.

14 (Defendant's Exhibit H marked  
15 for identification.)

16 Q. Let me show you Exhibit H. Can you identify  
17 what that is?

18 A. Well, this is the construction fence.

19 Q. Right.

20 A. I don't see anything.

21 Q. The construction fence and then to the left  
22 of what we are looking at in this picture is the  
23 water pipe, correct? That's on the railroad  
24 property, isn't it?

25 A. No, this has got to be on our property. I

1                   And the Gillette man next to Cambridge  
2           also confirmed to me that, you know, this was all  
3           farm land long before you guys got here with this  
4           Cambridge project.

5                   So I believe that -- I think all the  
6           clearing or essentially all the clearing was done  
7           before Cambridge got there because it was farm  
8           field from way back.

9           Q. So is it your testimony that before the  
10          mound was built, there was some survey done by  
11          Peterman & Associates, a legal surveyor, or are  
12          you not sure about that?

13          A. I'm sure of that.

14          Q. Before the mound was built, did you or  
15          anyone acting on behalf of Old Granite contact  
16          Vermillion to tell them that the mound was going  
17          to be built?

18          A. Vermillion?

19          Q. Yes.

20          A. No.

21          Q. Did you or anyone acting on behalf of Old  
22          Granite ever contact anyone at Vermillion to  
23          complain about the clearing and claim there was a  
24          trespass by the clearing at any time before the  
25          mound was built?

1 A. No, we didn't even know Vermillion existed.

2 Q. Did you contact anyone from Edwards Tree  
3 Clearing Service?

4 A. No.

5 Q. Well, you saw the trucks, right, from the  
6 land-clearing company?

7 A. That was afterwards, afterwards.

8 Q. It was before the mound was built?

9 A. Yes.

10 Q. I'm asking you before the mound was built  
11 and after the clearing was done, did anyone  
12 contact anyone from Vermillion or Edwards Tree  
13 Clearing Service to let them know that there was  
14 a complaint about alleged trespassing here?

15 A. We dealt with the City.

16 Q. That's not my question.

17 A. No, we did not go in -- we did not -- I did  
18 not call or contact Edwards or Vermillion.

19 Q. And that's true for both the claim that  
20 there was a trespass and the notice that there  
21 was going to be this filling or this mounding  
22 done on the property line?

23 A. That's right, I did not contact them.

24 Q. Did you take any photographs of any stumps  
25 or roots that you claim were cleared on the

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1 so forth?

2 A. Well, in our line of work, we didn't use a  
3 Hydro-Axe in residential areas. We didn't allow  
4 that.

5 Q. Was there some Corps requirement that said  
6 it wasn't permitted?

7 A. I don't know if there was any specific  
8 mention of that. There is all kinds of different  
9 equipment, but, generally speaking, forestry type  
10 equipment is not allowed to be used around  
11 residential areas.

12 Q. Do you know of any regulation or requirement  
13 on that?

14 A. The closest thing would be in our specs we  
15 used to call it suitable equipment, and that was  
16 it.

17 Q. Did your Army Corps of Engineers  
18 specifications identify what suitable equipment  
19 was?

20 A. We didn't have a list of it, no.

21 Q. Do you recall any occasion where someone  
22 wanted to use a Hydro-Axe and you told them no?

23 A. No.

24 Q. And is a Hydro-Axe specifically excluded in  
25 any regulation that you're aware of?

1 A. No.

2 Q. You don't consider yourself an expert in  
3 land clearing methods, do you?

4 A. I don't know what an expert would be on land  
5 clearing, but I'm not a clearing expert, no, I  
6 guess.

7 Q. Who's the trucking company that trucked the  
8 dirt from Five Points to this project?

9 A. I promise I'll get his name.

10 Q. You don't know?

11 A. I can't remember.

12 Q. Did you pay for that dirt, or was that dirt  
13 given to you just to get rid of it?

14 A. Paid for it.

15 Q. Do you know what you paid for it?

16 A. I can't exactly remember.

17 Q. Do you know what type of soil it was? Was  
18 it evaluated in any way?

19 A. No, it was from Perrysburg.

20 Q. Did you have any test done on it to  
21 determine what it was, whether it was clay or  
22 something else?

23 A. No, just went and looked at it and had it  
24 shipped.

25 Q. Have you prepared any written report of your

1       see -- I don't recall seeing lath. I mean, it  
2       was all pulled out; it was cleared. So I don't  
3       believe I saw any City lath, anything that was on  
4       the ground at that time.

5       Q. Did you take photos the first day that you  
6       saw this?

7       A. I don't know.

8       Q. Again, I asked you these questions. Marv  
9       interrupted before we got through with this. I  
10      would like to get through with this. I want to  
11      know what you've done to preserve those  
12      photographs so that we can be sure of the  
13      integrity of the photographs that were taken, the  
14      date they were taken, who took them and that they  
15      haven't been altered.

16               MR. ROBON: Don't answer it.  
17      They've asked you three times. I'm tired of it.

18               MR. FAGNILLI: You've never let him  
19      answer the question.

20               MR. ROBON: He left them in his  
21      computer is what he said and he gave some to the  
22      City.

23      Q. But you never let him answer the question as  
24      to what he did to preserve the integrity of those  
25      photographs.

1 MR. ROBON: If he did anything. Go  
2 ahead and answer. Let's get out of here.

3 A. I did my best. I filed them. I got some  
4 copies in the file. I have them on my computer.  
5 I said earlier people screw around with your  
6 computer. I don't know how much I got there. I  
7 have to have my son -- my son kind of helps me  
8 with my computer to see just what I got in there,  
9 what I don't.

10 Q. Do you have a different computer now than  
11 you had back in spring of 2006?

12 A. Yes, I got a whole new set-up, whole new  
13 program and that kind of thing.

14 Q. Did you throw the old box away?

15 A. No, we just put new programs in it.

16 Q. You didn't get a new computer box?

17 A. No.

18 Q. Did you switch from like Windows XP to  
19 Windows Vista or something like that?

20 A. I went to XP and some other things.

21 Q. What kind of camera did you have, digital  
22 camera?

23 A. I have a -- I got a cheap one. We had three  
24 cameras.

25 MR. ROBON: Do you know what kind